

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH TERENCE GAINES,

Defendant-Appellant.

UNPUBLISHED

May 3, 2012

No. 299328

Wayne Circuit Court

LC No. 08-003943-FC

AFTER REMAND

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 7 to 20 years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appealed his convictions, and this Court remanded for an evidentiary hearing on defendant's allegation of ineffective assistance of counsel during the plea negotiations. *People v Gaines*, unpublished order of the Court of Appeals, entered December 13, 2011 (Docket No. 299328). Following an evidentiary hearing, the trial court issued an order on January 20, 2012, finding that defendant did not receive deficient representation and that there was no reasonable probability that defendant would have accepted the prosecution's plea offer. We now affirm.

Defendant asserts that defense counsel was ineffective because during plea negotiations he failed to adequately explain what his sentencing range would be if convicted after a jury trial.¹ Whether a defendant received effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's factual findings at an evidentiary hearing are reviewed for clear error while questions of constitutional law are reviewed de novo. *Id.*

¹ At the evidentiary hearing held on the second remand, defendant waived his claim regarding his counsel's failure to call an alibi witness, thus, we will not review this issue. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

To establish a claim of ineffective assistance of counsel based upon counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer, the defendant must show that counsel's performance was objectively unreasonable and that the error prejudiced the defendant because, but for the error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010) lv held in abeyance ___ Mich ___; 792 NW2d 331 (2011). "An ineffective assistance of counsel claim may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer." *People v Douglas*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301546, issued April 12, 2012), slip op, p 10. "Counsel's assistance must be sufficient to enable the defendant 'to make an informed and voluntary choice between trial and a guilty plea.'" *Id.*, quoting *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). In the context of plea offers, prejudice can be demonstrated when there is a reasonable probability that the defendant "would have accepted the prosecutor's plea offer if he had been properly informed." *McCauley*, 287 Mich App at 163.

As noted, defendant claims that defense counsel did not accurately explain the difference in the sentencing range between the prosecution's plea offer and what he would receive after a jury trial conviction. We agree with the trial court that defendant failed to prove that defense counsel was deficient. At the evidentiary hearing, defense counsel testified that he had several discussions with defendant regarding the prosecution's plea offer prior to trial and that he advised defendant to accept the plea offer. Defense counsel denied telling defendant that the most prison time defendant could receive if he was convicted at trial was five to five and a half years. Defendant testified that defense counsel did not explain that his sentencing range could go up to 85 months if he was convicted by a jury. While defendant maintained his innocence, he stated that he would have accepted the plea offer if he had understood that the sentencing guidelines went up to 85 months because the risk of being sentenced to additional years if convicted by the jury would have been too great.

The trial court found that defense counsel was not deficient because he properly informed defendant of the plea offer and sentence. The trial court noted that there was evidence that defendant understood the plea offer because defendant indicated that the plea's sentencing terms were too high and he felt that he would not do any worse by going to trial. Furthermore, the trial court found defendant's assertion that he would have accepted the prosecution's plea offer disingenuous because defendant maintained that he was innocent. This Court will not resolve credibility determinations anew on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Thus, the evidence shows that defendant made an informed and voluntary decision when he elected to go to trial, *Douglas*, ___ Mich App at ___ (slip op at 10), and it was not reasonably probable that defendant would have accepted the plea offer, *McCauley*, 287 Mich App at 163.

We reject defendant attempt to liken his situation to that of the defendant in *McCauley*. In that case, defense counsel was found ineffective for failing to explain to the defendant that although he did not fire the fatal shot that killed the victim, he could still be convicted of the victim's murder under an aiding and abetting theory. *McCauley*, 287 Mich App at 163-164. Thus, the defendant was unable to make an informed decision regarding the prosecution's plea offer and the error prejudiced the defendant because it was probable that the defendant would

have accepted the plea offer if he had known he could be convicted of murder under an aiding and abetting theory. *Id.* Unlike the defendant in *McCauley*, defendant did not have a mistaken belief about what crimes the jury could find him guilty of committing. Rather, defendant maintained his innocence in committing any crime. And, the trial court here made a factual finding that defendant was properly advised of the possible sentences. Thus, *McCauley* does not entitle defendant to relief because he made an informed decision and it was not reasonably probable that defendant would have accepted the plea offer.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio